

United States District Court
Eastern District of California

Jose A. Soto,

Petitioner,

vs.

D. Adams, Warden,

Respondent.

No. Civ. S 04-2122 MCE PAN P

Order

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Petitioner requests appointment of counsel on the grounds he is indigent and lacks legal training and the law is complex.

There is no absolute right to appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, whenever the court determines the interests of justice so require, representation may be provided for any financially eligible person who is seeking relief under section 18 U.S.C. § 2254. 18 U.S.C. § 3006A(a)(2)(B). Unless an evidentiary hearing is necessary, the decision to appoint counsel

1 is discretionary. Bashor v. Risley, 730 F.2d 1228, 1234 (9th
2 Cir.), *cert. denied*, 469 U.S. 838 (1984); Rule 8(c), Rules
3 Governing § 2254 Cases.

4 In deciding whether to appoint counsel the court exercises
5 discretion governed by a number of factors, including the
6 likelihood of success on the merits and the applicant's ability
7 to present his claims in light of their complexity. Weygandt v.
8 Look, 718 F.2d 952, 954 (9th Cir. 1983); see also, LaMere v.
9 Risley, 827 F.2d 622, 626 (9th Cir. 1987). Ordinarily the
10 presumption of regularity in the state's procedures for confining
11 prisoners suggests a lack of likely success and counsels against
12 appointment of counsel. See Maclin v. Freake, 650 F.2d 885, 887
13 (7th Cir. 1981). As a general rule, the court will not appoint
14 counsel unless the applicant shows his claim has merit in fact
15 and law. Id. Even if the applicant overcomes this hurdle, the
16 court will not appoint counsel if the law is settled and the
17 material facts are within the petitioner's possession, viz., they
18 do not require investigation outside the prison walls. Id. at
19 887-88.

20 Here, petitioner alleges (1) the evidence was insufficient
21 to convict; (2) the trial court erred in refusing to instruct the
22 jury on the definition of fear and the prosecution's burden of
23 proof on that element; (3) admission of prior sex offenses
24 violated due process and diluted the state's burden of proof; (4)
25 instructing the jury that if they found petitioner previously
26 committed a sexual offense they could infer he had a disposition

1 to commit such offenses violated due process; and (5) the trial
2 court erred by instructing the jury for sentencing purposes that
3 it could find petitioner tied or bound a victim if it found
4 petitioner either restricted her movement or deprived one or more
5 of her senses. The law governing these issues is settled.
6 Neither factual development nor legal insight are required
7 because these proceedings are limited to claims that already were
8 identified and presented to the California Supreme Court. There
9 is, on the record before the court, no reason to believe
10 appointment of counsel would be of significant benefit.

11 Petitioner's September 21, 2004, request for the
12 appointment of counsel therefore is denied.

13 So ordered.

14 Dated: June 2, 2005.

15 /s/ Peter A. Nowinski
16 PETER A. NOWINSKI
17 Magistrate Judge
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